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IN THE

# Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

HAROLD TAYLOR, TRUSTEE UNDER THE WILL OF MARY E. ERSKINE, DECEASED, WILBUR ERSKINE,

*Petitioners,*

*v.*

HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,

*Respondent.*

## *PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.*

HAROLD TAYLOR,
DANIEL H. ORTMEYER,
*Counsel for Petitioners.*

E. A. HARDIN PRINT, INDIANAPOLIS

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*Petitioners,*
*v.*
HARRY W. VOSS, TRUSTEE IN BANKRUPTCY OF WILBUR ERSKINE,
*Respondent.*
No. ———.

*PETITION FOR WRIT OF CERTIORARI.*

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Harold Taylor, Trustee under the will of Mary E. Erskine, deceased, and Wilbur Erskine, respectfully petition this court for a writ of certiorari to require that there be certified to this court for review and determination the cause lately pending in the Circuit Court of Appeals for the Seventh Circuit, entitled Original Petition to Review and Revise. In the Matter of Wilbur Er-

skine, Bankrupt. *Harry W. Voss, Trustee of the Estate of Wilbur Erskine, Bankrupt, Petitioner, v. Harold Taylor, Trustee Under the Will of Mary E. Erskine, deceased, and Wilbur Erskine, Respondents,* wherein said trustee in bankruptcy was petitioner and said Taylor, trustee, under the will of Mary E. Erskine, and said Wilbur Erskine, were respondents.

The finding and decree of the Circuit Court of Appeals denied your petitioner's motion to dismiss the petition to review, and reversed the District Court upon the petition to review, holding that under Sec. 4 of an Act of September 6, 1916, (39 U. S. Stats. at L., p. 727; Sec. 1649a U. S. Compiled Stats. 1916), the petition to review should not be dismissed as improperly brought, but should be retained and treated as an appeal. No appeal or writ of error had been taken or asked for.

This is a controversy arising in bankruptcy, involving the right to the inchoate interest of the wife of the bankrupt in the real estate owned by him at the time he was adjudged a bankrupt or the proceeds thereof, and where the final decision of the Circuit Court of Appeals in reversing the District Court holds that the title to such inchoate interest does not vest in the wife, living, at the date of adjudication, but that whatever rights she took she lost by her death, which occurred subsequent to the adjudication and the appointment and qualification of the trustee in bankruptcy. The amount in controversy exceeds $2,000.00 and the determination of the questions involved, both as to procedure and as to the rejection of the wife's right to her inchoate interest, claimed by her trustee under her will, or if not to said trustee then to the surviving husband as after-acquired property, is essential to the uniform construction

and administration of the bankruptcy act throughout the United States.

BRIEF STATEMENT OF THE MATTER INVOLVED.

Mary E. Erskine, petitioners' decedent, was the wife of said Wilbur Erskine, bankrupt. She was alive and living with her said husband at the time of the filing of the petition in bankruptcy and the adjudication and the appointment and qualification of the respondent, Harry W. Voss as trustee in bankruptcy of said Wilbur Erskine. The wife was not a party to the petition in bankruptcy and never assigned or conveyed in any way her rights to her inchoate interest in the real estate owned by her husband at the time of the bankruptcy.

Said Mary E. Erskine died testate on March 21, 1921, subsequent to the date of the appointment and qualification of the said Voss as trustee in bankruptcy of said Wilbur Erskine, bankrupt. By her will she left all her estate, real and personal, in trust to said Taylor, trustee.

The chronology of these events is important.

On December 20, 1920, said Wilbur Erskine was adjudged a bankrupt in the United States District Court for the District of Indiana.

February 25, 1921, the respondent, Harry W. Voss, trustee in bankruptcy, was duly elected and qualified as the trustee in bankruptcy of said Wilbur Erskine, bankrupt, and entered upon his duties as such trustee, and still is such trustee in bankruptcy.

On all of the dates mentioned said bankrupt, Wilbur Erskine, was the owner of real estate in Vanderburgh County, Indiana, of a value in excess of $30,000.00.

On all of the said dates said Wilbur Erskine was a married man, his wife living with him in Evansville, Indiana, where they had lived for many years.

it must, for we do not believe the law requires idle things, then what is that interest, this dower interest of the wife? Who owns it and where does it go?

9. The court in its opinion says:

> "There is nothing in any of the four sections, 3037, 3029, 3014 and 2804, that in the remotest degree discloses any intent on any account to hasten or advance the time when the inchoate rights of the wife shall become absolute."

It is respectfully urged that it is the force and effect of the adjudication of bankruptcy and of the Bankruptcy Act that *advances the time* when the inchoate rights of the wife shall become absolute, and not the Indiana Statutes. The Bankruptcy Act controls from date of adjudication, and takes only the husband-bankrupt's portion and vests title to his portion in his trustee upon the adjudication, leaving the wife's portion to vest in her. It is respondent's contention that the Indiana Statutes simply provide the measure of this inchoate dower interest. Respondents urge that the opinion of the court does not give effect to the Bankruptcy Act, particularly Section 70a, as it has been construed by the courts of the United States as well as the decision of the Indiana Appellate Court in *Harlin, Gdn. vs. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213.

10. It is respectfully urged that this court has overlooked the decision in the case of *Harlin, Gdn. v. American Trust Company, Trustee*, 67 Ind. App. 213, cited on page ten (10) of respondents' original brief herein, in which case it is held that upon the adjudication in bankruptcy the inchoate interest of the bankrupt's wife becomes absolute and

entitled her to partition. That decision has never been overruled or questioned and states the law of Indiana. And if the inchoate interest becomes absolute upon the adjudication in bankruptcy the subsequent death of the wife will not diminish her rights or enlarge those of the Trustee in Bankruptcy.

It is further respectfully urged that this is in keeping with the rule laid down by the Supreme Court of the United States in construing the Bankruptcy Act, holding in effect that a subsequent death of a party does not affect the title of the Trustee nor the property to which he is entitled to administer as part of the bankrupt's estate to be devoted to the extinction of his debts, and holding that the Trustee takes title as of date of adjudication but only to such property as it was—as it stood at the time of the filing of the petition.

*Everett, Trustee in Bankruptcy of Judson v. Judson,* 228 U. S. 474.

11. It is respectfully urged that the court has overlooked the fact that it is not only the purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors, but it is the purpose of the law as well to give the bankrupt and his family a fresh start with such exemptions and rights as the statute left untouched and that the act should be construed in the light of that policy.

*Burlingham v. Crouse,* 228 U. S. 459, 473.

This Honorable Court in its opinion holds that on the death of the widow all her right in this property was ex-

On March 21, 1921, some time after the date of the appointment and qualification of said respondent Voss as trustee in bankruptcy for said Wilbur Erskine, bankrupt, said Mary E. Erskine died, testate. Her last will was duly probated March 26, 1921, and by its provisions left her entire estate, real and personal, in trust to said Taylor, trustee, under her said last will. (Rec., pp. 6-9.) Her said husband, Wilbur Erskine, bankrupt, also surviving her at that time. Question was made as to whether the wife's inchoate interest in the husband's real estate owned at date of adjudication had become vested in her at said date of adjudication or before her death, and if so, did it pass to the trustee under the will, or to the surviving husband.

On May 27, 1922, said Voss, trustee in bankruptcy, filed with the referee in bankruptcy an amended petition alleging the dispute as to title making said Taylor, as trustee under the will of deceased wife, and said Wilbur Erskine, as surviving husband, parties thereto denying they had any interest and asking that they be required to come into the bankruptcy court and set up any claim or right they had in said real estate, and that his rights as trustee in bankruptcy be declared free of any claim of said Taylor, as trustee, or said Wilbur Erskine. (Tr., pp. 22-23.)

On June 24, 1922, a written agreement was entered into between said Voss, trustee in bankruptcy, said Taylor, trustee under the will, and said Erskine, surviving husband, providing that the parties should appear to the amended petition of the trustee in bankruptcy then pending before the referee in bankruptcy, and, that to facilitate and advantage the sale of the real estate as a whole, all parties would join in deeds of conveyance, and that the trustee in bankruptcy would retain not less than one-fifth of the pro-

ceeds of the sales in his hands to await the final decision of the courts as to who would be entitled to the said moneys as representing the inchoate interest of the wife, and without prejudice to the rights of any of the parties. (Tr., pp. 10-11.)

Thereafter, on June 26, 1922, and agreeable to the agreement just referred to, your petitioners, said Taylor, trustee under the will, and said Erskine, surviving husband, voluntarily appeared in the bankruptcy court to said amend petition of respondent, and filed their answers to said petition. (Tr., pp. 23-25.)

For purposes of submitting the controversy to the bankruptcy court, all the parties, Harry W. Voss, as trustee in bankruptcy, Wilbur Erskine, surviving husband, and Harold Taylor, trustee under the will of Mary E. Erskine, deceased, joined in certain stipulations setting up the important facts and dates thereof as to the adjudication, appointment and qualification of the trustee; the ownership of real estate; that the bankrupt was married and his wife living with him at the date of the filing of the petition; date of adjudication, and date of appointment and qualification of the trustee; that she had died testate thereafter on March 21, 1921; that the bankrupt and his wife had been residents of Vanderburgh county for many years prior to the date named; that the wife had never joined in any conveyance of said real estate, nor did she join in the petition in bankruptcy; that she had died testate, and attaching a copy of the will to be used upon the submission; that she had not filed any suit for petition or to otherwise have her interest in her real estate of her bankrupt husband set off to her prior to her death; that all the files and papers, or any of them connected with the bankruptcy might be considered in evidence

and referred to by either of the parties, and that all the property had been sold under stipulations and agreements between the parties. (Tr., pp. 5-6.)

On March 14, 1923, the referee in bankruptcy made his finding and rendered judgment in favor of your petitioner, said Taylor, trustee under the will of Mary E. Erskine, deceased, in the sum of $7,374.00, and ordered the trustee to pay to the trustee under the will, that sum, representing one-fifth of the proceeds of the sale of the real estate sold by the trustee in bankruptcy, pursuant to the agreement already referred to. (Tr., pp. 11-12.)

Said Voss, trustee in bankruptcy, filed with the referee in bankruptcy his petition to review and revise the order of the referee, to review, which petition the referee certified to the District Court. (Tr., pp. 14-15.)

On April 24, 1923, the District Court denied the petition to review and approved the findings and order of the referee in bankruptcy. (Tr., p. 15.)

No appeal or writ of error was asked, allowed or taken from the said order of the District Court of April 24, 1923; but, on June 18, 1923, said Voss, Trustee in Bankruptcy, filed in the United States Circuit Court of Appeals for the Seventh Circuit, his original petition to review and revise the said order of the District Court in matters of law, so as to adjudge said trustee in bankruptcy "entitled to retain all the moneys in his hands resulting from the sales of real estate of bankrupt", and making your petitioners, respondents to said petition, etc. (Tr., pp. 1-4.) No transcript of the record in the District Court was filed with or made part of said petition to review. Copies of certain papers were attached as Exhibits to it.

On July 7, 1923, your petitioner, said Taylor, as trustee under the will of deceased wife, filed motion to dismiss said petition to review and revise. (Tr., pp. 15-17.)

Among the grounds given for dismissal one was that no appeal had been asked for, granted or taken, that the cause was one which could only be brought to the Circuit Court of Appeals by an appeal or writ of error. That the question of law desired to be submitted was not correctly stated, and calling attention to facts not stated in the petition.

On September 11, 1923, on motion of counsel for petitioner, said Voss, trustee in bankruptcy, the Circuit Court of Appeals ordered that certified copies of certain parts of the record in said cause be filed and made a part of the petition to review and revise theretofore filed in that court, subject to the objection of respondents, towit: (1) Trustees amended petition filed in cause No. 625, In the matter of Wilbur Erskine, bankrupt, on May 27, 1922, with Charles A. Burnett, referee in bankruptcy; (2) Answer of Wilbur Erskine and Harold Taylor, filed June 26, 1922, with Charles A. Burnett, referee in bankruptcy; (3) Petition for review and assignment of errors of Harry W. Voss, trustee in bankruptcy of the estate of Wilbur Erskine, filed March 21, 1923, with Charles A. Burnett, referee in bankruptcy. (Tr., p. 29.)

On June 20, 1924, the Circuit Court of Appeals refused to dismiss the trustee in bankruptcy's petition to review, held that it should be allowed as an appeal and reversed the District Court. (Op. of C. C. A., Tr., pp. 32-40, incl.)

On August 8, 1924, and within the time granted by the Circuit Court of Appeals for filing same, your petitioners,

(7) That it was error to hold and decide that the rights of the wife in the real estate owned by the bankrupt did not vest in her as of the date of adjudication.

(8) That it was error to hold and decide that upon the wife's death (subsequent to adjudication in bankruptcy and appointment and qualification of the trustee in bankruptcy) all her rights in this property were extinguished, and that no interest in the property passed to her trustee. In effect thus holding and deciding that no rights vested in the wife upon the adjudication, and that there was no right therefore to go to her estate, or to her husband surviving.

(9) That the decision is in conflict with the decision of this honorable court, holding that under the bankruptcy act the wife's inchoate interest in her bankrupt husband's real estate does not pass to the trustee in bankruptcy and forms no part of the bankrupt's estate.

(10) That the decision of the Circuit Court of Appeals is in conflict with ruling decisions of the United States Circuit Courts of Appeal in other circuits, holding and deciding that the wife's inchoate interest vests absolutely in her by operation of law as of date of the adjudication.

(11) This decision of the Circuit Court of Appeals is in direct conflict with and ignores the ruling cases in *Indiana of Harlin, Guardian, etc., v. American Trust Co., Trustee in Bankruptcy,* 67 Ind. App. 213, presenting this precise question construing the Indiana statutes and declaring the wife's inchoate interest vests in her as of date of the adjudication in bankruptcy and becomes part of her separate estate.

(12) That the Circuit Court of Appeals erred in denying these petitioners—respondents below—petition for rehearing.

The contention made by your petitioners (respondents below) to the petition of the trustee in bankruptcy was that the trustee in bankruptcy never took the wife's inchoate interest in the bankrupt husband's real estate owned by him at the time of the filing of the petition and adjudication in bankruptcy; that the wife's inchoate interest formed no part of the bankrupt's estate, but that it went directly to the wife, then living, by operation of law as of the date of the adjudication in bankruptcy, and vested in her as her separate property at that time; that having once vested, the wife's subsequent death following the appointment and qualification of the trustee in bankruptcy in no wife defeated or affected the interest which had already theretofore vested; that having so vested it was part of the wife's estate upon her decease, passing either to her trustee under the will or, if not to her trustee, then to the husband, by statutory direction.

The trustee in bankruptcy controverted this, asserting that no title vested in the wife as of date of the adjudication; that it remained part of the bankrupt estate coming to the trustee in bankruptcy, and upon her death all rights were lost; that it was controlled by the Judicial Sales Act and not by the general statutes fixing the wife's marital rights, and that if any rights had taken effect, the husband was the heir under the Judicial Sales Act, and that it would, through him, again become part of the bankrupt's estate in bankruptcy, to be administered as part of such bankrupt estate.

The effect of the decision of the Circuit Court of Ap-

peals is to sustain the contention of the trustee in bankruptcy, and is in conflict with the uniform practice which has been followed by the bankruptcy court in the District of Indiana, and which is shown by the case of *Harlin, Guardian, v. American Trust Company, Trustee in Bankruptcy*, 67 Ind. App. 213, heretofore referred to, where a fee simple one-third of the husband's property was set off to the wife as of date of the adjudication as having vested in her on that date, as her separate property, and followed and confirmed by the Indiana Appellate Court.

That the apparent holding and decision of the Circuit Court of Appeals that the wife's title to her inchoate interest in the bankrupt husband's lands does not vest as of date of the adjudication, has already created confusion and uncertainty in the administration of the Bankruptcy Act in the District of Indiana, being in direct conflict with and contrary to the established precedents and holdings of the bankruptcy courts upon that particular question.

What effect the death of the wife of a bankrupt after adjudication and appointment and qualification of the trustee may have upon the vesting her interest in the husband bankrupt's property owned by him at the date of the adjudication has never been passed upon directly by this honorable court, so far as we are advised, and it is in the interest of correct and uniform construction and administration of the bankruptcy act that this question be finally determined by this court.

Your petitioners present herewith a certified copy of the entire record in this cause, and respectfully pray that writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said court to

certify and send to this court on a day certain to be therein designated a full and complete transcript and the record of all proceedings in said Circuit Court of Appeals in the case therein entitled In the Matter of Wilbur Erskine, Bankrupt. Harry W. Voss, as trustee of the estate of Wilbur Erskine, bankrupt, petitioner, against Harold Taylor, trustee of the estate under the will of Mary E. Erskine, deceased, and Wilbur Erskine, respondents, in said court on petition of said Harry W. Voss, trustee in bankruptcy, for review. No. 3298, to the end that said case may be reviewed and determined by this court, as provided by law, and that the judgment of said Circuit Court of Appeals in said case may be reversed by this honorable court and that your petitioners may have such other and further relief in the premises as to this court may seem just and proper.

Harold Taylor, Trustee under the Will of
Mary E. Erskine, Deceased.
Wilbur Erskine.
By Harold Taylor
Daniel H. Ortmeyer
Their Counsel.

State of Indiana, County of Marion, ss:

Harold Taylor, being duly sworn, says that he is one of the counsel for above named petitioners, that he has read the foregoing petition and that the matters therein stated are true to the best of his knowledge, information and belief.

Harold Taylor.

Subscribed and sworn to before me this 8th day of November, A. D., 1924.

My commission as notary public expires on the 25th day of November, 1926.

(Seal.) Walter J. Trimble

Notary Public within and for the County of Marion and State of Indiana.

I hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the writ of certiorari prayed for.

Harold Taylor.

Of Counsel for Petitioners.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1924.

No. ——.

HAROLD TAYLOR, *Trustee under the Will of Mary E. Erskine, Deceased,*
WILBUR ERSKINE,
*Petitioners,*
HARRY W. VOSS, *Trustee of the Estate of Wilbur Erskine, Bankrupt,*
*Respondent.*

No. ——

*BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.*

The Circuit Court of Appeals, in denying the motion to dismiss the petition to review, said:

> "The proceeding in the District Court was not a summary proceeding, but was a plenary proceeding heard and decided in that court, and consent of the

parties could not affect the method of procedure to procure a review.

"For the above reasons, this case would have to be dismissed from this court, except for the provisions of Section 4 of an Act of September 6, 1916 (39 U. S. Stats. at L, p. 727; Sec. 1649a U. S. Compiled Stats. 1916):

" 'That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed.'

"While it is true that this section does not mention petitions for review, yet the clear legislative intent seems to be to remove the penalty for having misconceived a remedy. As the foregoing discussion shows, it has been easy to misconceive the remedy in matters coming from bankruptcy courts, and the difficulty in this case arose because counsel conceived that the matter dealt with was a proceeding in bankruptcy, reviewable under Section 24b, instead of a controversy arising in the bankruptcy proceeding, reviewable under Section 24a. In enacting Section 4, *supra*, Congress was not attempting to deal with appellate jurisdiction in proceedings in bankruptcy, but was dealing with appellate jurisdiction touching controversies arising in bankruptcy. Controversies arising in bankruptcy are law suits of the same kind and quality as other law suits not involved in bankruptcy. All such cases come to this court by appeal or writ of error, and we are of opinion that the use made of the terms 'appeal' and 'writ of error' should not be held to be a limitation upon what seems to be the broad command of the act not to dismiss a case merely because the remedy was misconceived, es-

> pecially where, as here, the record before us is in all respects the same as it would be on appeal. We shall consider the matter as here on appeal."

Counsel respectfully urge that the learned judges of the Circuit Court were in error in the statement that "the record before us is in all respects the same as it would be on appeal." In an appeal there would be an order of the Circuit Court, or of the District Court, allowing appeal, and a copy of the complete record of the District Court, duly certified to by the clerk of that court, under the seal of the court.

In the instant case there is no such order of either court and no such certified transcript of the record. The case came to the Circuit Court of Appeals on an original petition to review and revise, filed June 18, 1923, and the only paper that was filed in that court was the original petition to review and revise, with the accompanying exhibits; which exhibits did not purport to be a transcript of the record, or certified to as such.

Such original petition to revise is not a record on appeal, as required by law. It is merely petitioner's petition to review and revise in matter of law. Respondents below, promptly on July 7, 1923, moved to dismiss said original petition to review and revise on the ground, among others, that no appeal had been asked for, or granted, or taken, and in ample time for them to have taken appeal and filed a record on appeal.

On September 11, 1923, on motion of counsel for said Voss, trustee in bankruptcy, certified copies of certain parts of the record in the cause, consisting of three papers, were made a part of petition to review and revise theretofore filed in that court.

After the filing of those additional papers on September 11, 1923, there was no record as on appeal on file in the Circuit Court of Appeals. The only papers on file in that court in said cause consisted of an original petition to review and revise, with the exhibits thereto attached, including the parts of the record admitted to be filed and made a part of the petition to review and revise by the order of September 11, 1923.

The filing in a Circuit Court of Appeals of an original petition to review and revise is not the filing of a record on appeal. It is a petition by a petitioner and is not the filing of a record on appeal. It is a petition by a petitioner and is not a record in the sense that the term "record" is used when we speak of filing a record on appeal.

Prior to the adoption of the amendment of September 6, 1916, the Supreme Court had said that a petition to review and revise under 24b and an appeal under 24a were exclusive, and not cumulative; that where a party had a right to review and revise under 24b, he did not also have a right to appeal under 24a. In the general law and equity practice frequently an appeal was taken when it should have been writ of error, or writ of error taken when it should have been appeal. Some times these were very close questions. Some times the proper procedure, whether of equity or of law, presented very close cases. Evidently this was the situation intended to be covered by the amendment of September 6, 1916, to the Judicial Code—Section 4 referred to.

During this same period mistakes had been made in seeking to obtain reviews by petition instead of appeal, and the clear distinction between the two procedures had been

pronounced by the Supreme Court, and followed by the various circuit courts of appeal of the United States. As in the *Matter of Loving*, 224 U. S. 183, and *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, where the difference in the nature of the two procedures was clearly defined and the court had held that the petition to revise was not the proper remedy where an appeal was the remedy provided for, and that a petition to review and revise could not be treated as an appeal.

Congress must be presumed to have known of this situation and that they must use language to include the separate statutory procedure of petitions to review and revise provided for in the bankruptcy act, if they intended Section 4 of the Act of September 6, 1916, to cover and include petitions to review and revise in bankruptcy. Yet, no such language is found in any part of the law. First, it was entitled "An Act to Amend the Judicial Code; to fix the time when annual terms of the Supreme Court shall commence and further to define the jurisdiction of that court." The express language of this amendment includes only appeals and writs of error which are the only established methods of appellate procedure under the general judicial code.

The petition to review and revise under 24b of the bankruptcy act is not a part of the general judicial code, but is confined to the bankruptcy act.

If, as we may assume, the Act of September 6, 1916, was intended to cover and protect against mistakes in the general appellate procedure under the general judicial code, how can judicial construction extend that meaning without any words to express it, to take in the statutory bank-

ruptcy procedure of petitions to superintend and revise, with its special and even informal and summary procedure.

Appeals in equity and writs of error in law serve the same purpose, in their respective procedures, to accomplish review in the Appellate Court and give practically the same jurisdiction involving law and facts; and they can well be used interchangeably; whereas the petition to review under the bankruptcy act presents only a question of law upon the facts as stated in the petition.

It is for these reasons that the courts have uniformly held that a petition to review could not be treated as an appeal; because it differs in its nature, and in the narrowed jurisdiction obtained by the Appellate Court and in the requirements of the procedure including no requirement as to the record from the lower court.

Yet, the language of the Amendment of September 6, 1916, is direct and positive and points out, not in general terms, but in specific language, naming the proceedings that are not to be dismissed. The words "no court shall dismiss a writ of error" and "no court shall dismiss an appeal" are definite and, we submit, exclusive. No other procedures are to be included in its terms.

Counsel respectfully urge that there is no rule of statutory construction that permits us to disregard such plain language, nor to disregard the fact that Section 4 of the Act of September 6, 1916, is by its title and associate sections made to refer only to the appellate procedure of appeals and writs of error under the general code.

These decisions of the Supreme Court defining and marking the essential differences between a petition to review and an appeal had stood for years prior to the enactment of the Judicial Code of September 6, 1916. In view of the established rule that the petition to review could not

be accepted as an appeal because of essential differences of procedure and jurisdiction, may it not be as well presumed that Congress in enacting said amendment to the judicial code that it would be unwise to have them made interchangeable, and that such a rule would be of doubtful benefit. And by what rule of statutory construction can an appellate court say that it will by judicial construction extend a statute relating to general equity and law procedure to cover a statutory procedure applicable only under the statute of which it forms a part. Would not such a rule lead to judicial enactment, rather than judicial construction, of law.

In *Gauzon v. Compania, Gen., etc.*, 245 U. S. 86, the Supreme Court has held that said Section 4 of the Act of September 6, 1916, does not abolish the distinction between writs of error and appeals, but only requires that the party seeking review shall have it in the appropriate way notwithstanding a mistake in choosing the mode of review.

The Supreme Court has laid down this rule which has never been reversed, changed or modified by any decision that we have been able to find: that the petition to revise was not the proper remedy where adverse interests are involved. In the *Matter of Loving*, 224 U. S. 183.

In *Duryea Power Co. v. Sternbergh*, 218 U. S. 299, the Supreme Court makes a clear distinction between appeals allowed under the bankruptcy act and petitions to superintend and revise, calling attention to and defining the difference in the nature of the procedures and holding that a petition to superintend and revise could not be treated as an appeal, and calling attention to the fact that on appeal the jurisdiction of the Circuit Court of Appeals is

broadened, but on a petition to review the jurisdiction is narrowed.

This rule has been consistently followed by the several Circuit Courts of Appeal and petitions to review dismissed since the enactment of Section 4 of September 6, 1916.

No where in any decision of the Supreme Court, or of any of the Circuit Courts of Appeal, except in the instant case, has any court even intimated that Section 4 of the Act of September 6, 1916, was intended to apply to petitions to revise under Section 24b of the Bankruptcy Act, but invariably where the case could be brought up only on appeal such petitions to review have been dismissed, thus making direct conflict in the decisions of the Circuit Courts of Appeal in the different circuits.

In the very recent case of *McBride v. Mullinix*, from the Eighth Circuit Court of Appeals, 299 Fed. 162 (Advance Sheets dated August 28, 1924), where it was sought to bring the controversy up by petition to review under 24b, whereas it should have been brought up by appeal under 24a, as in the instant case, the Circuit Court of Appeals dismissed the petition.

In another case in the same circuit. *In re Smith-Flynn C., etc., Co.* (decided in 1923), 229 Fed. 465, the Circuit court of Appeals for the Eighth Circuit, in passing upon a case upon petition to review, said:

> "We are convinced that in the present case the proper remedy is appeal. Petition to revise is therefore dismissed."

The Circuit Court of Appeals for the Fourth Circuit, *In re Becker*, 285 Fed. 706, held that the matter presented was reviewable by appeal and not by petition to superin-

tend and revise. "The petition must therefore be dismissed." (Citing cases.)

The Circuit Court of Appeals for the Fifth Circuit, in the case of *In re Jones*, 294 Fed. 832, the petition to review was likewise dismissed as not the proper procedure.

The Circuit Court of Appeals for the Second Circuit, in the case of *In re Interborough Consolidated Corporation*, 288 Fed. 334, where only petition to review and appeal were taken, held that the remedies of appeal and petition to revise are not cumulative and that the inappropriate remedy will be dismissed. Dismissed the petition and heard the case upon the appeal, "which entitled this court to review both questions of law and fact."

It is to be noted that in the case of *In re Becker*, from the Fourth Circuit, referred to above, there was also an appeal taken. That the case was reviewed by the Circuit Court of Appeals upon the appeal; that petitions for writ of certiorari were presented to the Supreme Court in both the case on appeal and the case on petition to review; that both the petitions for certiorari were granted and that Supreme Court reviewed the case upon the appeal, not upon the petition to review and revise.

*Liberty National Bank v. Bear*, 44 Sup. Ct. Rep. Adv. Sheets, July 1, 1924, at page 499.

A direct conflict between the various circuits is shown to exist from these decisions, which should be settled by a decision of the Supreme Court, to establish uniform practice and procedure under the Bankruptcy Act through the United States.

Further, the matter of the construction of Section 4 of an Act of September 6, 1916, amending the general Judi-

cial Code as here presented, is an entirely new question, and the decision of the Circuit Court of Appeals in the instant case is upon principle in conflict with the ruling precedents of the Supreme Court, as well as in conflict with the decisions of the Circuit Courts of Appeal in other circuits, and which can only be settled by a ruling from the Supreme Court.

What effect does the death of the wife living at date of the adjudication in bankrutcy and appointment of the Trustee in Bankruptcy have upon her dower or other marital interest in the lands of her bankrupt husband, presumed to have vested in her by operation of law as of the date of the adjudication under the provisions of the Bankruptcy Act.

That dower or inchoate interest of the wife living at date of the adjudication and appointment and qualification, in the lands of the bankrupt, does not pass to the Trustee in Bankruptcy under the provisions of the Bankruptcy Act, has been held by the Supreme Court as well as Circuit Courts of Appeal in various circuits.

Sec. 70a (5) Bankrutcy Act;
*Porter v. Lazear*, 109 U. S. 84;
*In re Hays* (6th Cir.), 181 Fed. 674, 676;
*Marine National Bank v. Swigert* (6th Cir.), 262 Fed. 254;
*Thomas v. Woods* (8th Cir.), 173 Fed. 585.

To the same effect:

*Harlin, Gdn. v. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213, 218.

It is to be noted that under the Indiana Statutes, dower has been abolished and in lieu thereof the wife is given absolute fee simple interest in one-third, one-fourth or one-fifth, according to the value of the husband's property; where it is over $20,000, it is an undivided one-fifth interest.

The Indiana Statutes further provide that the wife can not be deprived of her interest, except with her assent, evidenced by her acknowledgment thereof in the manner required by law.

It has been the uniform practice in bankrutcy matters in the District of Indiana to set off to the wife such undivided interest as of date of the adjudication as appears was done by the referee in the bankruptcy proceedings mentioned in the case of *Harlin, Gdn., v. Am. Trust Co., Trustee in Bankruptcy,* already referred to.

The sections of the statutes fixing the wife's interest in the husband's property, and which your petitioners assert are controlling, are Sections 2864, 3014, 3029 and 3037, Burns' R. S. Ind. 1914. These sections are as follows, arranging them for the purposes of this inqury, in their logical order, to-wit:

Section 3037 reads:

> "35. No act or conveyance, performed or executed by the husband without the assent of his wife, evidenced by her acknowledgment thereof in the manner required by law; nor any sale, disposition, transfer or incumbrance of the husband's property, by virtue of any decree, execution or mortgage to which she shall not be a party (except as provided otherwise in this act), shall prejudice or extinguish the right of the wife to her third of his lands or to her jointure, or preclude her from the recovery thereof, if otherwise entitled thereto."

Section 3029 reads:

> "27. A surviving wife is entitled, except as in section 17 (Sec. 2483) excepted, to one-third of all the real estate of which her husband may have been seized in fee-simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law, and also of all lands in which her husband had an equitable interest at the time of his death: Provided, That if the husband shall have left a will, the wife may elect to take under the will instead of this or the foregoing provisions."

Section 3014 reads:

> "17. If a husband die testate or intestate, leaving a widow, one-third of his real estate shall descend to her in fee-simple, free from all demands of creditors: Provided, however, That where the real estate exceeds in value ten thousands dollars, the widow shall have one-fourth only, and where the real estate exceeds twenty thousand dollars, one-fifth only, as against creditors."

Section 2864 reads:

> "122. If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds parts thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof, for said purpose."

These sections are respectively Sections 17, 27 and 35 of the Act of 1852, entitled, "An Act regulating descents and

the apportionment of estates," and Section 122 of the Decedents' Estate Act of 1881, entitled "An Act providing for the settlement and distribution of decedents' estates."

It will be noted that by the language of the Indiana State Statutes above quoted, the wife's inchoate interest, whether it be one-third, one-fourth or one-fifth as the amount of the husband's estate may vary, cannot be sold to pay the husband's debts but the title vests directly in the wife. The court directs the sale of only the undivided interest of the husband, the wife's remaining undivided interest vesting in her free of any rights of creditors or others.

The Circuit Court is evidently in error in holding that the right of composition prevents the title vesting by operation of law as of date of adjudication. There is no evidence nor any statement in the record presenting any question arising as upon a composition.

As the right of composition is defined by the Supreme Court in *Cumberland Glass Co. v. DeWitte*, 237 U. S. 447, 453, it is rather in the nature of a contractual relation voluntarily entered into by offer of the bankrupt and accepted by a majority of the creditors, and has no bearing upon the bankruptcy, unless an offer of composition has been confirmed; otherwise, the estate shall be administered in bankruptcy as therein provided. To hold that right of composition, never exercised, holds in abeyance the title of the trustee for any period, contrary to Section 70, *a*, would be indirect conflict with the express language of the statute and the decisions construing same.

The case of *Davis v. Kelly*, 97 N. E. 336, decided by the Supreme Court of Indiana, relied upon by the Circuit Court of Appeals in this case, does not present a situation analagous to the matter here involved, as there was no ques-

tion of bankrutcy or title to a trustee in bankruptcy, and the sections of the statutes fixing the wife's inchoate interest, here referred to, were not in any wise involved.

The same is true as to all the Indiana cases cited by the Circuit Court. None involve bankruptcy.

The Judicial Sales Act of 1875 referred to by the Circuit Court of Appeals in its opinion is an act relating to certain judicial sales as is shown by its title, and does not change or impair the general statutes of descent, and which are controlling within the intent and meaning of the Bankruptcy Act, as construed by the courts. The title of the 1875 act clearly establishes the distinction. The Act of 1875 is entitled: "An Act vesting the inchoate interest of married women in the lands of their husbands in the title of the husband therein has been divested by certain judicial sales, providing for the possession thereof, and the descent of such vested estate, and matters connected with such sales." (Acts 1875, page 178, approved March 11, 1875.)

The act itself does not purport to create the inchoate interest; in fact, it only refers to it. The Bankruptcy Act relates to the general rule of the state as to the wife's inchoate right of dower. The Act of 1875 does not purport to cover the administration of all the husband's property, either as in case of general assignment or the administration of a decedent's estate. It is easily conceivable that the wife might get the benefit of the Act of 1875 as to a particular parcel or parcels of real estate, and the husband still have more than sufficient property out of which to make good her inchoate right of dower. To hold that the Judicial Sales Act of 1875 applies and controls in bankruptcy matters, it would be necessary to hold that the

Federal Bankruptcy Act is a judicial sale, that it takes the wife's inchoate interest and sells it and pays her the fixed sum therefor; all of which is contrary to the language of the Bankruptcy Act itself and to the federal decisions construing the act.

Recognizing that it would be improper to burden this brief with an extended quotation from a reported case, we invite this court's attention particularly to an Indiana case, which is on all fours with the instant case, and which is the ruling case in Indiana upon this point, and which reviews the Bankruptcy Act and the Indiana Statutes relied upon by your petitioners, and holds that the undivided interest (one-fourth in that case) vests upon the date of adjudication, and which was overlooked or ignored by the Circuit Court, though cited in counsel brief. See *Harlin, Gdn. v. American Trust Co., Trustee in Bankruptcy*, 67 Ind. App. 213. That was an action by the Trustee in Bankruptcy against the Guardian of the wife, for partition.

In the bankruptcy proceedings, the Referee in Bankruptcy had set off to the wife an undivided one-fourth as representing her statutory inchoate interest and ordered the trustee to sell the remaining three-fourths. He had been unable to sell and brought suit for partition. The court sustains the suit, finds the wife became a tenant in common to the lands with the Trustee in Bankruptcy upon the vesting of the title as of date of adjudication.

While the opinion refers to the Judicial Sales Act, it quotes and relies upon the sections we have quoted, emphasizing Section 3037, that the wife's interest may not be alienated or taken from her, and is complete without any reference or weight given to the Judicial Sales Act.

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The Circuit Court of Appeals in its opinion, says:

> "We are of opinion that on the death of the wife all her right in this property was extinguished."

As there is nothing in the decision of the Circuit Court to indicate that anything had vested or come to the wife as a result of the adjudication in bankruptcy, the plain meaning of this is that there was no right taken by the wife at any time, and that any conditional right was extinguished by her death subsequent to the appointment and qualification of the Trustee in Bankruptcy.

How the learned court could decide this question as it did, and express no opinion as to what rights a wife living at the date of adjudication and appointment and qualification of the trustee may have or take under the Bankruptcy Act and the Indiana statutes, we are unable to understand.

If we read the opinion correctly it is based upon the theory that the titles do not vest under the Bankruptcy Act by operation of law as of date of the adjudication, as provided in Section 70a (5) of the Bankruptcy Act, and misconstruing or giving no effect to the Indiana statutes providing that the wife's inchoate interest can not be alienated or taken from her without her consent, which must be expressed according to law, which would require her joining in a deed or other instrument of conveyance with her husband. The decision apparently gives no effect to the language "by operation of law", in the Bankruptcy Act, and which has been so uniformily construed since those words were included in the Bankruptcy Act. It apparently overlooks the fact that under the Indiana statutes the wife's inchoate interest in an absolute fee, and not a life estate. And, in any view of the matter, no matter which theory of

the Indiana statutes as to inchoate interest may be finally taken, there was a vested interest, which the wife never conveyed or assigned to anyone; and at her death it went either by her will to her trustee, if not to him, then to her surviving husband. Yet the Circuit Court, by its finding, declares there was no interest; but, if there was any, it "was extinguished by her death."

The confusion from such decision can be cleared up only by a ruling and decision by the Supreme Court.

The question here presented would never have been raised had it not been for the death of the wife. It appears from the facts in the record that offers were received by the Trustee in Bankruptcy after his appointment, but not accepted by him. If they had been accepted, even upon the Trustee in Bankruptcy's theory, the question would have been entirely different.

To emphasize the petitioners' contention that the title vests as of the date of the adjudication in bankruptcy, we would ask how long could sales be deferred and how it is to be determined under the Bankruptcy Act as to what date and when and upon what happening shall the title to the property vest in the trustee and be closed. Does not the very suggestion of such a construction of the Bankruptcy Act indicate a matter of doubt and consequent inequality of administration in the various circuits and districts of the United States?

We respectfully submit that the petition should be granted and writ of certiorari issued as prayed for.

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